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In the Supreme Court
of the United States

OCTOBER TERM, 1958

No. 687

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed a summary judgment against petitioners entered by the United States District Court for the District of Oregon.

OPINIONS BELOW

The opinion of the district court (R. 63) is unreported. The opinion of the court of appeals (infra, p. 21) is reported in 259 F.2d 658.

JURISDICTION

The judgment of the court of appeals was entered September 29, 1958 (R. 87; App, B, infra 24). A timely petition for rehearing was denied November 12, 1958 (R. 88). The jurisdiction of this court is invoked under 28 U.S.C., §1254(1).

QUESTION PRESENTED

1. A United States District Court action is brought against a contractor to recover excessive profits on war business for one World War II year.

2. It is admitted that the business actually lost money on its war business over the entire war period.

3. The district court refused to consider in any way the admitted fact that any profits, excessive or otherwise, had been completely eliminated by later losses on war business.

4. Summary judgment was entered for the government for the full amount.

In an action to recover excessive profits for one war year, is a district court powerless to consider the fact that a war contractor actually lost money on war business over the entire war period?

STATUTES INVOLVED

This action arose under the Renegotiation Act (56 Stat. 245, 982; 57 Stat. 348, 564; 50 U.S.C. App. §1191); the particular provision thereof primarily involved herein is §403(c)(2)(v) of the original 1942 act (56 Stat. 245, 982) providing in part as follows:

> "The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection."

The above and other pertinent provisions of the Renegotiation Act are printed in Appendix A, infra 17-20).

STATEMENT OF THE CASE

(a) Procedural History

During the years 1942 through 1945, the individual petitioners were partners in W. A. Rushlight Company, a contractor subject to the Renegotiation Act. On December 18, 1945, the Secretary of War unilaterally determined that the partnership had excessive profits of $80,000 for its calendar year 1942 (R. 6). Thereafter the partnership petitioned the Tax Court of the United States for a redetermination of this amount (R. 30), which culminated in a decision reducing the amount to $66,700 (R. 32, 46). The tax court did not consider the facts at issue here (R. 35, 36).

This is an action to recover such "excessive profits" pursuant to 28 U.S.C., §1345 and §403(c) of the Re-

negotiation Act. A summary judgment was entered for respondent for $48,330.99 ($66,700 excessive profits less $10,553.98 tax credit and a payment of $7,815.03; R. 67). Petitioners appealed to the court of appeals, which court affirmed the district court.

(b) Facts Material to Question Presented

The following is a compilation of all of the partnership profits from sales and contracts subject to renegotiation (without any allowance included for partners' salaries):

1942	$137,392.54*
1943	133,875.88
1944	154,352.19
1945	108,229.55

Total war profit $ 8,686.68 (R. 37; App. B, infra 22)

The tax court for the year 1942 allowed partners' salaries of $13,300 as a cost (not reflected in the above figures) (R. 55).

Before the tax court, petitioners pleaded and offered to prove that all the partnership renegotiable war profits — for the entire four-year period — were as above shown. Such proof was rejected, and no consideration was given thereto (R. 39-42).

Thereafter, in this district court collection action the petitioners, in an affirmative defense (R. 34), and in a request for admissions (R. 39), again raised the same

(*$112,389 of this amount was the profit on a contract entered into on March 20, 1942, which was prior to the enactment of the Renogotiation Act on April 28, 1942; R. 47-49.)

issue, i.e., the court should consider the fact that subsequent war contract losses had in fact totally eliminated the "excessive profits" for which respondent was suing. The district court held that it could not consider the fact that the petitioners made no profit, (R. 66, 67) and granted a summary judgment (R. 67). This was affirmed by the court of appeals (R. 87).

REASONS FOR GRANTING THE WRIT

The respondent recovered a judgment bottomed on the proposition that the petitioners received excessive profits. In fact they received *no profits* — excessive *or otherwise*. Petitioners have never been allowed to develop these facts in any court. To date, the fact that they did not receive any profits has been deemed to be totally irrelevant and immaterial.

As the court of appeals stated:

> "the whole four year profit on war business was about $58,000 less than the amount . . . . charged against them for excessive profits for the one year 1942 alone." (R. 84, 85; App. B, infra 22)

In fact, the admitted "plight" (infra 23) of the petitioners is even worse than appears on the face of the court of appeals' opinion as is shown by the following compilations:

Total profit without salary allowance	$ 8,686.68
Less salary allowance at modest rate set by tax court ($13,300 per year)	53,200.00
Loss on war business prior to renegotiation	44,513.32

Giving effect to renegotiation and the judgments of the lower federal courts, the result is:

Loss on war business	$ 44,513.32
Plus district court judgment for "excessive profits" prior to crediting payment of $7,815.03	56,146.02
Total cost to petitioners, "for their business experience with the government" (App. B, infra 22)	$100,659.34

As is pointed out in *Lichter v. United States*, 334 U.S. 742, the Renegotiation Act was designed to prevent wartime profiteering, — historically a cancerous outgrowth of all previous wars. There the difficult constitutional problem of applying the Act to contracts (such as petitioners') entered into *prior* to its enactment was met and answered under the war powers. This court held that in time of war the government could conscript property as well as men. Therefore it was only reasonable and within legislative competence to partially equalize the sacrifices of the civilian with those in uniform — at least to the extent of seeing that the former did not unreasonably profit from the war.[FF]

There is no suggestion in the *Lichter* case that the Act is a revenue measure or that it was upheld as such. It was plainly and simply designed to prevent war profiteering — that was its sole purpose. The court recognized that it was necessary for the government to

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[FF]Here the petitioner Raymond G. Rushlight was both, having served in the army from June 1943 to December 1945, thirteen months of which period he spent overseas (Tax Court Tr. 93, 94).

proceed in a somewhat summary manner; pointing out, however, that "resulting injustices can and should be carefully examined and as far as possible relieved" (334 U.S. at 754).

Implicit in and supplemental to the *Lichter* opinion and this case are some basic truths that may well affect the lives, liberty and well-being of every citizen, living and prospective:

1. When an enemy strikes now or in the future, the lightning rapidity of the shock will make the attack on Pearl Harbor seem as slow, deliberate and predictable as Sherman's march to the sea.

2. The government must have the instant obedience and wholehearted cooperation and effort of every business, as well as every individual.

3. Billions have been, and will be, spent, merely in the hope of, and preparation for, securing such instant help in such an eventuality.

4. Generally speaking, World War II was a good example of such effort by business, as indicated in the *Lichter* opinion.

5. All recognize that the profit motive, despite outward manifestations of patriotism, was, and will be, the motivating force of a large percentage of enterprises — expectation of at least a fair return on investment was the wellspring of the magnificent showing made by U.S. business in World War II.

6. All agree that war-time business is entitled to a fair profit.

7. Nearly all agree that the war profiteer should be ferreted out and stripped clean of his ill-gotten gain.

8. The result in this case to date goes far beyond anything contemplated or intended by Congress, sanctioned by this court, or approved by the public generally.

9. It was never the intent of anyone that any businessman was to be *penalized* as a war profiteer under the circumstances present here. The only really pertinent question is, and was, and should be: "Did these contractors, over the entire war period, accumulate an unconscionable gain?" If yes, separate them from such improper gain. If not, leave them alone.

10. The few dollars the government may gain here by reason of a strait-jacketed reading of a special statute with a result obviously never intended by Congress, are as ill-gotten and unconscionable as those pocketed by the war profiteer.

11. It is the prerogative of the federal courts to prevent manifest injustice not only for that reason in and of itself, but particularly when it can be seen that a failure to intervene will establish a respectable precedent which will, in the future, cause caution and indecision at the very time that complete trust and faith in the fairness and integrity of the government will be essential. Without such, total cooperation cannot be expelted at a time when our very existence may hang in the balance — with the balance being finally determined by the amount of effort and cooperation shown by the persons affected by this decision.

Thus, all logic, common sense and fairness is offended here by the fatalistic and negative approach of the lower federal courts.

But what about the decisions of this court in this general field?

Firstly, could the tax court have done anything for petitioner? No.

Concededly, the tax court and the renegotiators did not consider anything but the year 1942 (R. 39-42). Yet the district court's decision was based on its assumption that the decision of the tax court was "res judicata" (R 63). That doctrine, however, can only apply to what was presented or *could have been presented* to that body. The tax court *rejected* petitioners' proof that petitioners, because of later war years' losses, in fact had *NO* profits. Being an administrative body and not a court, it was correct in so doing. [See *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 422, where this court in holding the Board of Tax Appeals (now tax court) had no equitable powers, said: "The Internal Revenue Code, not general equitable principles, is the mainspring of the Board's jurisdiction"; and *Laskey v. Commissioner*, 352 U.S. 1027, where this court affirmed a decision that would not allow that statutory agency to exercise the powers inherent in a district court.]

Furthermore, the tax court and the renegotiators were prevented by the Act itself from considering such

matters. § 403(a)(4)(c) of the Act provides that "no amount shall be allowed as an *item of cost*" by reason of a carry-over or carry-back. — However, it cannot be said that such language was intended by Congress to include the courts, or to inhibit a federal district court from exercising powers which have been inherent in our legal system since the founding of the Republic — and which have roots firmly entrenched in the even more distant past.

When Congress desires to deprive a court of an inherent, basic and historic power, it leaves no doubt as to its intention, e.g., Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §101, et seq. Of course, Congress intended that the tax court's decision as to the year 1942 be conclusive. That does not, however, mean that it meant to deprive a district court of its historical functions or reduce and degrade it to the role of a menial "enforcement agency in the vicinage of the contractors"! (App. B, infra 23) Such is the decision of the court of appeals herein. Our federal district courts have never been considered to be rubber-stamp tribunals existing for the convenience of governmental agencies in enforcement matters.

Therefore, and secondly, the *one and only* tribunal that could possibly grant the relief which the court of appeals desired, but was fearful to grant and recognize, was, and is, the district court. That court refused to even hear or consider the admitted fact that petitioners did not have excessive war profits.

In 1942 when Congress provided for an action in district court against a war contractor, it did not place any limitation on the power of the district court. There is no indication in the statute or in the legislative history that such action was to be treated any differently than any other action.

What is the nature of the government's action in this case? The "excessive profits" found by the tax court arose under a contract which was entered into *prior* to the enactment of the Renegotiation Act. Thus the obligation of petitioners to repay excessive profits cannot be contractual.

When called upon to do so in the rare but proper case, this court has defined the nature of an action by or against the government in circumstances such as this, i.e., an action not based upon contract. (*Stone v. White*, 301 U.S. 532, and *Bull v. United States*, 295 U.S. 247.)

In the *Stone* case this court analyzed the basic nature of an action between the sovereign and a citizen based upon a duty to pay money imposed by law (not on contract express or implied). That is also the situation in the case at hand. This court said such an action is "the lineal successor of the common count in *indebitatis assumpsit* for money had and received," and that "Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles . . . . have long been recognized." (301 U.S. at 534.) Apropos of the present action the

court continued, "Since . . . the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right" (301 U.S. 535).

In that case the plaintiff trustee, on the face of things, had a flawless action to recover overpaid federal taxes on an item of income taxable to the beneficiary. Here the respondent had a similar flawless right to recover the excessive profits for 1942 as determined by the tax court. — There the defense was that the defendant in equity and good conscience was not indebted because recovery would inure to the benefit of the trustee's beneficiary who owed uncollectible taxes on the same item of income. In other words, the government did not have money that in *equity and good conscience* was repayable to the plaintiff. Here the defense is the same, i.e., the partnership does not have excessive profits which in equity and good conscience should be returned to the government. If the action of the lower court stands, petitioners have nothing to show for four years' work but a disastrous loss to which there is added the lower court's judgment — on the proposition that petitioners were war profiteers!

The *Bull* case (295 U.S. 247) involves the doctrine of equitable recoupment as opposed to the assertion of an equitable defense. [For the distinction see *Mertens, Law of Federal Income Taxation*, Section 60.05 (Chap. 60, page 19)]. Independent of the doctrine of the *Stone* case, the facts as to losses in later years are material

and should have been considered under the rules laid down by this court in the *Bull* case.

In *Bull*, the taxpayer was allowed to recoup an outlawed claim for a refund of estate taxes against an asserted income tax deficiency where both items arose out of the same transaction. — Here the court has before it (a) a single period, i.e., the war years; (b) one renegotiation act; (c) one partnership; and (d) the total renegotiable sales and contracts of such partnership. Therefore the lower court could and should have examined every aspect of the transaction. This action was not brought until long after the war was over (November 6, 1946, R. 12), and the government had available the entire picture.

Congress recognized a duty on the part of the government to reimburse war contractors for *losses* on renegotiable war business. [See the War Contracts Hardship Act (Lucas Act) 60 Stat. 902, 62 Stat. 992, 41 U.S.C.A., §106, Note]. The lower court in granting a summary judgment refused to even hear the facts, and in so doing ignored the plain reasoning behind *Stone* and *Bull*.

In proper cases the courts continue to apply the doctrine of the *Stone* and *Bull* cases. [See opinion of Justice Learned Hand in *Cuba Railroad v. U.S.*, C.A. 2d Cir. 1958, 254 F.2d 280, cert. den., 358 U.S. 840]

Stone and *Bull* are taxes cases. When this court indicated it is proper to apply equitable principles in the tax field, it should be even clearer the same prin-

ciples apply in a case of this type. Therefore the lower court is in error when it says that "it is not our sphere, or the district court's sphere, to grant the relief we would like to grant," or that ". . . . inequities . . . . are beyond adjustment by us." (App. B, infra 22-23)

On the subject of taxes, it is admitted that petitioners settled all of their tax liabilities with the government (R. 39-40).

Thus, there can be no doubt that the courts have the power and authority in an action of this type to examine and act upon the very facts which the lower courts refused to even hear.

It is obvious that in instances such as this the courts are not reduced to puerile breast beating and expressions of condolence when confronted with an unconscionable situation.

Not only do the lower courts have the power and duty to do justice — it is imperative that they act. Faith in the power and integrity of our courts must be maintained. Faith in the inherent fairness of our government, particularly in time of national peril, must be fostered. The courts cannot allow either of these basic concepts to become watered down or suspect by the public generally. It is in the interest of the entire nation that this court make it clear that a federal court shall not stand idly by, wringing its judicial hands, in a case such as this. No institution can long endure without the healthy respect of those citizens and persons it embodies. No one, however wicked, worldly or wanton he may be, respects weakness or vascillation, or fearfulness to do

that which is obviously right and proper. No one desires such an attitude on the part of our federal court system.

The federal district court should be required to receive and consider the matters which it refused to hear.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Section 403(c) of the Renegotiation Act (56 Stat. 245 982), provided in part, as follows:

"Sec. 403 (c). (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

"(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract

"(i) by reductions in the contract price of the contract or subcontract or by other revision in its terms; or

"(ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or

"(iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or

"(iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profts actually paid to him; or

"(v) by any combination of these methods, as the Secretary deems desirable. *The Secretary may*

bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

"(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2 E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in Section 3806 of the Internal Revenue Code." (Emphasis supplied)

[Note: The above section was a part of the original Renegotiation Act of 1942. By Section 701 (b) of the Revenue Act of 1943 (P.L. 235, 78th Congress, 58 Stat. 78) the foregoing section was amended and appears in 50 U.S.C., Appendix, § 1191, in its amended form. The amendment was effective for fiscal years ending subsequent to June 30, 1943. The respondent's action was brought under the above section, prior to its amendmen.]

Section 403 (a)(4)(C) of the Renegotiation Act states, in part:

"Notwithstanding any of the provisions of this section to the contrary, no amount shall be allowed

as an item of cost * * * (ii) by reason of the application of a carry-over or carry-back under any circumstances."

[Note: The above was one of the retroactive amendments made by Section 701 (b) of the Revenue Act of 1943 (Renegotiation Act).]

Section 403 (e) of the Renegotiation Act provides:

"Sec. 403 (e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under section (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, 1121 of the Internal Revenue Code

in the case of a proceeding to redetermine a deficiency.

* * *

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date or such determination, file a petition with The Tax Court of the United States for redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the count under paragraph (1), except that the amendments made to this section by Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PER CURIAM:

The Rushlight partnership made a substantial profit on its war contracts for the year 1942. The Secretary of War on December 18, 1945, acting under the provisions of the Renegotiation Act,[1] unilaterally determined the partnership to have made excessive profits for the year 1942 in the amount of $80,000. Upon taxpayer's petition for redetermination filed with the tax court, it reduced on September 5, 1956, the amount of excessive profits to $66,700.[2] From such a determination, there is no appeal: The act says so.

Suit was brought by the government in the U.S. District Court for the District of Oregon for the 1942 excess profits. After allowing credits not here material, the district court entered judgment against the Rushlights for $48,330.99 plus interest from September 5, 1956. The result was to deny a defense asserted by the defendants and to hold the determination of the tax court to be untouchable. The defendants appeal the district court's judgment and the government cross appeals on a question of interest.

---

[1] See 56 Stat. 245, et seq.; 58 Stat. 78, et seq., and 50 U.S.C. App. § 1231 f.

[2] The original complaint by the government was filed November 26, 1946. However, the trial court held the case dormant until the redetermination of the liability was made by the tax court. Then the case became active again.

No doubt if the district court's judgment is upheld the defendant have paid dearly for their business experience with the government. The situation pulls at one's sympathy, but we have determined it is not in our sphere, or the district court's sphere, to grant the relief we would like to grant. Therefore, the judgment must be affirmed.

The attempted defense was this: The Rushlights, according to their accountants, had the following experience with their renegotiable war business with the government:

For the year 1942, $137,392.54, a net profit, the amount before renegotiation.

For the year 1943, $133,875.88, a net profit.[3]

For the year 1944, $154,352.19, a net loss.

For the year 1945, $108,229.55, a net loss.

In sum, for the four years, $8,686.88, a net profit.

From the foregoing, it will be seen that the whole four year profit on war business was about $58,000 less than the amount the Rushlights have had charged against them for excessive profits for the one year 1942 alone. So the Rushlights claimed a right in the district court of equitable recoupment.

We are impressed with the stern validity of the government's position: That the Congress in providing for the redetermination of these renegotiation matters

[3] There is no indication that the Secretary of War ever renegotiated the 1943 profit. The act, of course, left the contractor with his losses.

wanted them exclusively in the tax court. The district court's function was left as little more than an enforcement agency in the vicinage of the contractors.

Bass v. United States, 8 Cir., 221 F.2d 494, cert. denied, 350 U.S. 827, is squarely in point. We think we must follow it. Our reading of Bull v. United States, 295 U.S. 247, and Stone v. White, 301 U.S. 532, (which we think have been limited by such cases as Rothensies v. Electric Storage Battery Co., 329 U.S. 296) does not convince us that they go as far as the Rushlights would take us. Here the Renegotiation Act compartmentalized business by the year. It provided for no loss carry-overs or loss carry-backs on profits and losses on government contracts subject to renegotiation. Much as the plight of taxpayers appeals to us, we feel that we have no more authority to import such principles into contracts subject to renegotiation than we would have had to import loss and gain carry-overs and carry-backs into the income tax laws before the Congress put them there, or to extend such tax features in income tax cases out of a sense of fairness, beyond years now permitted by the Internal Revenue Code.

In these wartime statutes, many inequities occur. But most of them are beyond adjustment by us.

The government cross appeals because it was denied interest from the partnership from the time the Secretary of War made his determination to the time the tax court made its determination, a period of over ten years. In our opinion the determination on interest, as

made, was at least within the trial court's sound discretion, if not required on the facts of this case.

Judgment affirmed.

HAMLEY, Circuit Judge (Concurring):

I concur, but do not wish to join in the expression of sympathy for appellants, or to indicate that I would like to grant the relief they seek. It may be that, if all the facts were known, they are deserving of sympathy. But the record before us does not, in my view, disclose sufficient information concerning the transactions on which money was lost to warrant an expression of our emotional inclinations. We do not know that the contracts on which appellants lost money involved entirely different kinds of work. For all we know, appellants may have made unjustifiably low bids on work which they were not qualified to do, and that but for this the Government could have had the work done by other contractors at only a slightly higher price.

(Endorsed:) Per Curiam Opinion and Concurring Opinion. Filed Sept. 29, 1958.

Paul P. O'Brien, Clerk.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR NINTH CIRCUIT

Appeals from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: September 29, 1958

PAUL P. O'BRIEN, Clerk

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Office-Supreme Court, U.S.
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MAR 18 1959
JAMES R. BROWNING, Clerk

No. 667

In the Supreme Court of the United States

OCTOBER TERM, 1958

W. A. RUSHLIGHT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon (R. 63-66) is not reported. The *per curiam* opinion of the United States Court of Appeals for the Ninth Circuit and concurring opinion (Pet. App. B) are reported at 259 F. 2d 658.

JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1958 (R. 87; Pet. App. B, p. 25). A timely petition for rehearing was denied on November 12, 1958 (R. 88). The petition for a writ of

certiorari was filed on February 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly ruled that the Tax Court's determination of petitioners' excessive profits for 1942 under the Renegotiation Act was binding on the District Court, and was, in any event, correct under the applicable provisions of the Act.

STATUTES INVOLVED

The applicable provisions of the Renegotiation Act of 1942, 56 Stat. 245, as amended, 58 Stat. 78, 50 U.S.C. App. 1191, *et seq.*, are set forth in Appendix A to the petition.

STATEMENT

This action was brought by the United States in the United States District Court for the District of Oregon under § 403(c)(2)(iv) of the Renegotiation Act (Pet. App. A, p. 17) to recover excessive profits made by petitioners during the year 1942 on certain Government war subcontracts (R. 3-12). On December 5, 1957, that court granted summary judgment for the United States in the amount of $48,330.99 plus interest from September 5, 1956 (R. 67-71). On subsequent appeals by both parties,[1] the Court

[1] The cross-appeal of the United States was predicated on the District Court's failure to award it interest from the date of original demand of excessive profits from the contractor. The District Court awarded interest only from the date of the final Tax Court redetermination ten years later.

of Appeals affirmed the judgment of the District Court.

The pertinent facts may be summarized as follows:

Petitioners were partners in the W. A. Rushlight Company, organized on March 12, 1942, with its principal place of business during the year 1942 in Portland, Oregon (R. 47). During the period March 27, 1942 to December 31, 1942, petitioners received or accrued $471,485 primarily from the performance of Government contracts or subcontracts for the installation of plumbing and heating equipment at Walla Walla Air Base, Washington (R. 48, 52, 53). From these sales, subject to renegotiation under the Renegotiation Act of 1942 (R. 49), petitioners realized profits, before renegotiation, of $137,393 (R. 49).

In accordance with the provisions of the Renegotiation Act, the War Department Price Adjustment Board, on December 18, 1945, unilaterally determined that petitioners had realized excessive profits in the amount of $80,000 from its renegotiable contracts during the period March 27, 1942 to December 31, 1942 (R. 6-10). On the same date, petitioners were notified of the determination of $80,000 by the Chairman of the War Department Price Adjustment Board (R. 11). In this notification, the Chairman formally demanded payment of the renegotiation debt, less any applicable tax credit (R. 11).

Within ninety days subsequent to the Board's determination and pursuant to § 403(e)(2) of the Renegotiation Act of 1943 (Pet. App. A, p. 20), peti-

tioners filed a petition in the Tax Court of the United States seeking a redetermination of their excessive profits as determined by the War Department Price Adjustment Board (R. 30). During the proceedings before the Tax Court, petitioners attempted to introduce into evidence a certain exhibit (R. 37) allegedly demonstrating petitioners' profits and losses for the years 1943, 1944 and 1945 (R. 41). However, the Tax Court, in agreement with the Government contention that the Act prohibited "carry-over or carry-back [of losses] under any circumstances" [§ 403(a)(4)(C), Pet. App. A, pp. 18-19], considered such evidence immaterial and incompetent (R. 41). And after trial in the Tax Court, that court entered an order on September 5, 1956, based on detailed findings of fact and an opinion, redetermining petitioners' excessive profits in the amount of $66,700 for the relevant period March 27, 1942, through December 31, 1942 (R. 32, 46-55).

Previously, on November 26, 1946, as authorized by § 403(c) of the 1942 Act (Pet. App. A, pp. 17-18), the Government filed a complaint in the District Court seeking to recover the unpaid 1942 excessive profits of $80,000 less applicable tax credits (R. 3-12). The District Court action was held in abeyance pending the redetermination proceeding in the Tax Court and settlement of the applicable tax credit. Following the September 5, 1956, Tax Court decision and determination of the tax credit, the Government filed a final amended complaint in the District Court seeking judgment in the amount of $66,700 (the Tax Court's redetermined amount of excessive profits)

less a tax credit of $10,553.98, making the debt sued for $56,146.02 plus interest (R. 28-32).

In their answer to this complaint, petitioners did not quarrel with the amount of the principal debt for 1942 but alleged, by way of defense, that their losses for the years 1944 and 1945 had not been considered by the Tax Court (R. 33-37). Petitioners alleged, in effect, that such losses in subsequent years from renegotiable contracts nullified any excessive profits for the year 1942 (R. 33-37). In addition, petitioners filed requests for admissions asking the Government to admit petitioners' attempt in the Tax Court to introduce evidence showing subsequent losses and that such evidence had been ruled inadmissible by the Tax Court (R. 39-42).

On April 2, 1957, the Government moved to strike this defense and the requests for admissions and also moved for summary judgment, asserting, *inter alia*, that the District Court did not have jurisdiction to review or redetermine matters decided by the Tax Court, that the decision of the Tax Court was *res judicata*, and that there was no dispute or question of fact relating to the amount of the debt stemming from the determination of excessive profits as finally and conclusively determined for 1942 by the Tax Court (R. 42-45). On December 5, 1957, the District Court, after concluding that it lacked jurisdiction to consider matters raised in the Tax Court and that the Tax Court's determination of the amount of the principal debt was binding on the District Court, granted the Government's motions awarding the Government the principal amount sought less a

payment of accrued interest which the court applied to principal (R. 67-71).

On petitioners' appeal, the Ninth Circuit affirmed, *per curiam*, holding that the Tax Court's decision was binding on the District Court (Pet. App. B, pp. 22-23). Moreover, the court observed, the Renegotiation Act did not permit the carry-back of losses in subsequent years as contended for by petitioners. In a concurring opinion (Pet. App. B, p. 24), Judge Hamley agreed with the court on applicable legal principles but disagreed with any expression of sympathy for petitioners' situation since the record before the court did not indicate the reasons for the losses sustained in 1944 and 1945.

ARGUMENT

As the Court of Appeals observed, petitioners' reliance on an argument of "equitable recoupment" with regard to different renegotiable contracts performed in different years is misplaced for two principal reasons. The argument was pressed by petitioners before the Tax Court, rejected by that court, and taken up again by petitioners only by way of defense to the Government's enforcement action in the District Court. However, at this latter stage of the proceedings, the decision of the Tax Court was conclusive and binding on the District Court. *Bass* v. *United States*, 221 F. 2d 494 (C.A. 8), certiorari denied, 350 U.S. 827; see also, *United States* v. *California Eastern Line*, 348 U.S. 351. In any event, as noted by the court below, the contention of equitable recoupment asserted by petitioners constitutes no

more than an attempt to obtain a carry-back of losses from subsequent years to nullify their 1942 excessive profits. This attempt must fail since the Renegotiation Act expressly precludes such a carry-back. Moreover, completely aside from the statutory prohibition, the doctrine of equitable recoupment as enunciated in earlier decisions of this Court has no application to the facts here. See *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296. Hence the decision below is clearly correct, there is no conflict in decisions, nor is there any other reason for further review by this Court.

1. As is evidenced by petitioners' answer to the Government's final amended complaint in the District Court, their argument here and in the District Court and Court of Appeals, that losses in 1944 and 1945 from renegotiable contracts should nullify the determination of excessive profits for the year 1942, was also urged on the Tax Court by petitioners (R. 35-36). That court, agreeing with the Government that § 403(a)(4)(C) (Pet. App. A, pp. 18-19) expressly prohibited the carry-back of losses in this way, rejected petitioners' offer of proof of losses in 1944 and 1945 as immaterial and incompetent (R. 41). Under the statute, § 403(e)(1), Pet. App. A, p. 19, the Tax Court's subsequent determination of excessive profits for 1942 was conclusive and binding with regard to the District Court collection proceeding in all respects. *Bass* v. *United States*, 221 F. 2d 494 (C.A. 8), certiorari denied, 350 U.S. 827; see also, *United States* v. *California Eastern Line*, 348 U.S. 351.

Thus, as stated by the Eighth Circuit in *Bass, supra*, (221 F. 2d at 496-7):

> We think the District Court could not, under the circumstances, logically have done otherwise than grant the motion of the United States for a summary judgment. As the District Court ruled, the decision of the Tax Court in the redetermination proceeding initiated by the defendants in that court, which proceeding was between the same parties with respect to the same claim, was res judicata not only as to all questions presented to the Tax Court but as to all questions which could have been presented to that court. * * *
>
> The Tax Court alone had jurisdiction to redetermine the amount of excessive profits realized by the defendants. * * * Any questions as to jurisdiction of the Under Secretary of War to determine excessive profits or of the Tax Court to decide the issues presented to it and any questions as to the constitutionality of the Renegotiation Act or the proceedings taken under it were subject to review under 26 U.S.C. § 1141. * * * Since we are convinced that the decision of the Tax Court could not be reviewed, reopened or collaterally attacked in the District Court and was res judicata as to the validity and amount of the Government's claim, there is no justification for stating the various contentions of the defendants relating to the alleged invalidity of the claim.

2. (a.) In any event, as the Court of Appeals properly ruled, petitioners' contention flies in the face of the statutory prohibition against a carry-back of losses in determining excessive profits for any one

year. Section 403(a)(4)(C), Pet. App. A, pp. 18-19, expressly provides that for purposes of determining excessive profits for a given year, "no amount shall be allowed as an item of cost * * * by reason of the application of a carry-over or carry-back under any circumstances".

Petitioners, in an attempt to avoid this obvious bar to their position, now concede, in contrast to their position in the Tax Court, that the Tax Court was precluded from considering losses in 1944 and 1945 by the statutory prohibition against carry-backs. Nonetheless, petitioners argue, in effect, that while § 403(a)(4)(C) reflects Congressional intention with regard to the Tax Court, the sweeping prohibition therein against carry-backs is inoperative whenever the Government is forced, as it was here, to resort to a collection suit in the District Court. Of course, the complete answer to this argument is that Congress never intended the statutory bar against carry-backs to be so emasculated.

(5.) Finally, the authorities relied on by petitioners in support of their argument of equitable recoupment have been sharply limited by this Court and are clearly distinguishable from this case. *Stone* v. *White*, 301 U.S. 532, and *Bull* v. *United States*, 295 U.S. 247, the principal decisions relied on by petitioners, were both tax cases. In each, a single transaction had been subjected to two taxes on inconsistent legal theories. Nonetheless, in each case, defendant's claim, while otherwise valid, was barred by the applicable statute of limitations. And in each case this Court permitted recoupment, stressing that "re-

coupment is in the nature of a defense arising out of some feature of the transaction on which plaintiff's action is grounded". *Bull* v. *United States*, *supra*, at 262.

Subsequently, in *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, a taxpayer sued to recover income and excess profits taxes assessed and paid on a refund in 1935 of excise taxes erroneously paid between 1922 and 1926. The taxpayer claimed that, if this refund had been properly taxable, the Court, under *Bull* and *Stone*, should permit recoupment of other excise taxes erroneously paid between 1919 and 1922, recovery of which was barred by the statute of limitations. This Court, however, refused to extend the doctrine of recoupment in tax litigation beyond the facts of *Bull* and *Stone*, holding that recoupment "has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects * * *". 329 U.S. at 299.

Closely akin to the claim of the taxpayer in *Rothensies* and unlike the situation in either *Bull* or *Stone*, petitioners below attempted to offset losses stemming from renegotiable contracts performed in 1944 and 1945 against the excessive profits determination arising out of their performance of completely separate renegotiable contracts in 1942. Moreover, petitioners' losses in 1944 and 1945 were derived almost entirely from their operation in those years of a "Steel Works Division" of the partnership (R. 37), work not even remotely related to the performance

of the plumbing and heating subcontracts completed in 1942 and from which the excessive profits in question were realized. Consequently, even if there were no statutory bar to carry-backs in the Renegotiation Act, petitioners' recoupment contention would in no way meet the requirements of this Court's decision in *Rothensies*.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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